Office-Supreme Court, U.S.
FILED
MAY 4 1981
ALEXANDER L. STEVAS,
CLERK

80-1861

IN THE

Supreme Court of the United States

October Term, 1980
No.

DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE, ET AL.,
Appellants,
-vs-
ROBERT RODGERS AND JOHNNY HAMPTON,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT STATE CIVIL CASE

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May, 1981

NATIONAL REPRODUCTIONS CORPORATION, DETROIT, MICHIGAN

QUESTION PRESENTED

DOES A STATE'S RULE OF PROCEDURE VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY AUTHORIZING SERVICE OF PROCESS BY PUBLICATION ALONE AS THE BASIS FOR A JUDGMENT IMPOSING PERSONAL LIABILITY UPON AN INDIVIDUAL?*

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*The parties to the proceeding in the Michigan Supreme Court were the Detroit Automobile Inter-Insurance Exchange, Willie Davis, Louis Scott and Paul Hines, appellants herein; Robert Rodgers and Johnny Hampton, appellees herein; Fanny Mae Davis, who has no interest in the outcome of this appeal; and the Michigan Secretary of State, who has no apparent interest in the outcome of this appeal.

The default judgment against Fanny Mae Davis was vacated by the Michigan Court of Appeals (22a).

The Michigan Secretary of State filed a motion to dismiss the claim against him on the grounds that the identities of both the owner and the operator of the vehicle involved were known. M.C.L. §§257.1107, .1112. Although no order of dismissal was ever entered, the failure of Plaintiffs to serve the individuals involved does not detract from the fact that they were known. Accordingly, the Michigan Secretary of State has no apparent interest in the issue herein presented.

Willie Davis, Louis Scott and Paul Hines, principal defendants below, are aligned as appellants herein because, in this appeal, their interests coincide with that of Appellant Detroit Automobile Inter-Insurance Exchange. They are inactive parties herein because they have not received notice of any of the proceedings.

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JURISDICTIONAL STATEMENT
STATE CIVIL CASE

OPINIONS BELOW

The Opinion of the Michigan Supreme Court, filed on February 3, 1981, the Opinion of the Michigan Court of Appeals, and the Opinion of the Wayne County Circuit Court are set out in the Appendix hereto. The decision of the Michigan Supreme Court is reported as *Krueger v. Williams*, 410 Mich. 144, 300 N.W.2d 910 (1981). The decisions of the lower courts are unpublished.

JURISDICTION

The decision of the Michigan Supreme Court in this case was filed on February 3, 1981 (28a-50a). It upheld against

constitutional challenge the validity of a court rule which was construed to authorize service of process by publication alone to support a personal judgment against an individual. The case was remanded to the trial court for a finding as to whether Plaintiffs had exercised due diligence in attempting to locate Defendants but were unable to serve them by other means better calculated to give actual notice. Notice of appeal to the Supreme Court of the United States was filed with the Michigan Supreme Court and the Wayne County Circuit Court on or about March 20, 1981 (51a-54a) and an Order Staying Proceedings Pending Appeal was entered on March 27, 1981 (55a-56a).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2) and 28 U.S.C. §2101 (c). That such jurisdiction exists in the circumstances of this case is sustained by *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975) and *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 94 S. Ct. 407, 38 L. Ed. 2d 379 (1973).

CONSTITUTIONAL PROVISIONS AND COURT RULES

U.S. Const. amend. XIV, §1 provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Mich. Const. 1963 art. 1, §17 provides:

"No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed."

Michigan General Court Rule 105.8 provides:

"The court in which an action has been commenced may, in its discretion, allow service of process to be made upon a defendant in any other manner which is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard, if an order permitting such service is entered before service of process is made upon showing to the court that service of process cannot reasonably be made in the manner provided for under other rules."

STATEMENT OF THE CASE

Plaintiffs, Robert Rodgers and Johnny Hampton, initially filed suit against the City of Detroit, Michael De Wolfe, Detroit Police Department, Department of Street Railways, Delmar Lawrence and James M. Hare, Secretary of State of the State of Michigan, jointly and severally (Complaint). Plaintiffs alleged they they were riding as paying passengers on a D.S.R. bus, driven by Delmar Lawrence, when a Detroit Police car, driven by Michael De Wolfe and chasing a Ford Mustang, went through a stop sign at a high rate of speed and collided with the bus, causing Plaintiffs injury (Complaint, ¶2).

James M. Hare, Director of the Motor Vehicle Accident Claims Fund, was named as a party Defendant because Plain-

tiffs alleged that an unknown driver and/or owner was involved in the accident (Complaint ¶3). The Secretary of State filed a Motion for Summary Judgment of Dismissal, stating that Plaintiffs' attorney had been advised by the Motor Vehicle Accident Claims Fund that the owner of the Ford Mustang automobile was Fanny Mae Davis and that the driver at the time of the accident was Louis Scott (Motion for Summary Judgment of Dismissal, ¶3). The police report indicated that Willie Davis and Paul Hines were passengers in the Mustang at the time of the accident (Brief in Support of Motion for Summary Judgment of Dismissal).

Plaintiffs were allowed to amend their Complaint. The Amended Complaint merely added Defendants Fanny Mae Davis, Louis Scott and Paul Hines.

Plaintiffs then filed a Motion for Substituted Service based on a statement that they had made diligent but unsuccessful attempts through members of their office staff and outside investigative agencies to locate the Defendants (Motion for Substituted Service, ¶3). Plaintiffs requested that they be allowed to serve Defendants by registered mail to the last known address of Fanny Mae Davis and by publication in the Detroit Legal News once a week for a period of five weeks, naming Fanny Mae Davis, Willie Davis, Louis Scott and Paul Hines as Defendants (Motion for Substituted Service, ¶4). Wayne County Circuit Court Judge Thomas J. Foley granted that request (1a).

Plaintiffs filed a Default, and judgment was entered against Fanny Mae Davis, Willie Davis, Louis Scott and Paul Hines in favor of Robert Rodgers in the sum of EIGHT THOUSAND AND 00/100 DOLLARS ($8,000.00) and Johnny Hampton in the sum of FOUR THOUSAND AND 00/100 DOLLARS ($4,000.00) together with interest and costs (3a).

Two days later, Plaintiffs filed an Affidavit for Garnishment After Judgment against the Detroit Automobile Inter-Insurance Exchange [hereinafter DAIIE]. Garnishee Defendant DAIIE moved to vacate the Default Judgment and to dismiss the garnishment for the reason that the court's Order for Substituted Service was contrary to Michigan General Court Rule [hereinafter G.C.R. 1963] 105.8[1] and was not calculated to give the principal Defendants actual notice of the proceedings and an opportunity to be heard (Motion to Vacate Default Judgment and to Dismiss Garnishment, ¶5). The Motion was denied (5a-6a).

The trial of garnishee liability took place before Wayne County Circuit Judge Theodore R. Bohn, sitting without a jury. An Opinion was issued (6a-14a) and Judgment was entered in favor of Plaintiffs and against Garnishee Defendant (14a-15a).

RAISING THE FEDERAL QUESTION

DAIIE took an appeal of right to the Michigan Court of Appeals. In the first paragraph of its Brief on Appeal, DAIIE stated:

> "This appeal is filed in behalf of appellant's insured, Willie Davis, Louis Scott and Fannie Mae Davis who we believe are still without notice of this pending suit. Plain-

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[1]The Committee Notes explaining the Rule establish that it is to be construed to authorize any method of service valid under the due process clause of the Fourteenth Amendment to the United States Constitution. 1 Honigman & Hawkins, Michigan Court Rules Annotated, Rule 105.8, Committee Notes, pp. 111-12.

The Michigan General Court Rules do expressly authorize service of process by publication, but only "in civil actions in which personal jurisdiction over a defendant is *not* required . . . ." G.C.R. 1963, 106.1 (emphasis added).

tiffs-Appellees were seeking a judgment for money damages against the principal defendants. The complaint stated an action *in personam* and, therefore, required personal service of process in order for the court to acquire jurisdiction and also the power to enter a binding judgment. However, the principal defendants never received actual notice of the summons and complaint through personal service. The principal defendants were thereby denied any opportunity to defend and consequently suffered the denial of their constitutional right of due process."

In an unpublished per curiam opinion, (16a - 22a), the Michigan Court of Appeals vacated the Default Judgment against Fanny Mae Davis for failure on the part of the trial court to demand strict compliance with the requirements of service by registered mail. However, the Court of Appeals found no error in the trial court's allowance of substituted service on the principal Defendants by publication alone. It affirmed the Default Judgment against Willie Davis, Louis Scott and Paul Hines and affirmed the Garnishment Judgment against DAIIE.

After rehearing was denied by the Court of Appeals (22a-23a), DAIIE was granted leave to appeal to the Michigan Supreme Court (24a-25a). The parties were "directed to include among the issues to be briefed (1) whether the trial court erred in considering the prerequisites for substituted service when personal jurisdiction was required by not requiring an appropriate affidavit in support thereof to show diligent inquiry; and (2) whether the trial court erred in finding that GCR 1963, 105.8 authorizes service of process by publication to obtain personal jurisdiction as a means reasonably calculated to give actual notice of the proceedings and an opportunity to be heard." (24a)

Issue II. A. of Appellant's Brief of Appeal stated:

II.

"THE TRIAL COURT ERRED IN FINDING THAT WHERE PERSONAL JURISDICTION WAS REQUIRED, GCR 1963, 105.8 AUTHORIZED SERVICE OF PROCESS MY MERE PUBLICATION AS A MEANS REASONABLY CALCULATED TO GIVE ACTUAL NOTICE OF THE PROCEEDINGS AND AN OPPORTUNITY TO BE HEARD.

A.

UNDER THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND OF CONST. 1963, ART. 1, SEC. 17, PERSONAL JURISIDCTION MAY NOT BE PREMISED UPON SERVICE OF PROCESS BY PUBLICATION ALONE."

The Michigan Supreme Court filed its opinion in the instant case and its companion case, *Krueger* v. *Williams,* on February 3, 1981. (28a-50a). The Court framed the issues for decision in this case as follows:

> "In *Rodgers,* the second case before us, appellant DAIIE contests both the type of service which was allowed and the manner in which the substituted service was granted. It argues that to premise personal jurisdiction on service of process by publication alone is violative of the constitutional guarantee of a due-process right to notice. Appellant also contends that where personal jurisdiction is necessary, GCR 1963, 105.8, requires an appropriate affidavit of facts showing the diligent inquiry made by plaintiffs to locate defendants."

(40a-41a)

The Michigan Supreme Court went on to construe G.C.R. 1963, 105.8 as authorizing service of process by publication alone to obtain personal jurisdiction over a defendant, and sustained its validity against DAIIE's constitutional challenge. It then remanded the case to the trial court in order that Plaintiffs be permitted to show that, "prior to the time substituted service was originally ordered, they had exercised due diligence to locate defendants but were unable to serve them under other rules and that means better calculated to give actual notice than publication were not feasible . . ." (47a)

THE DECISION IS FINAL

Although there are further proceedings to occur in the state courts, the Michigan Supreme Court's decision is final within the meaning of 28 U.S.C. §1257(2). Michigan law precludes later review of the federal issue regardless of the outcome.

If, on remand, the trial court were to find in favor of Plaintiffs on the question of due diligence in attempting to locate the principal Defendants, governing state law would not permit DAIIE to re-assert the federal claims decided by the Michigan Supreme Court in the instant appeal. *Leland* v. *Ford*, 252 Mich. 547, 548, 233 N.W. 410, 411 (1930); *Pierce* v. *Riley*, 81 Mich. App. 39, 43, 264 N.W. 2d 110, 113 (1978) ("A conclusion reached in an earlier appeal to the Michigan Supreme Court becomes the law of the case and is not subject to review on appeal from a subsequent trial.") Therefore, the judgment of the Michigan Supreme Court is final. *Cox Broadcasting Corporation* v. *Cohn*, 420 U.S. 469, 485, 95 S. Ct. 1029, 1041, 43 L. Ed. 2d 328, 344 (1975); *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156, 162, 94 S. Ct. 407, 412, 38 L. Ed. 2d 379, 385 (1973). *See Shaffer* v. *Heitner*, 433 U.S. 186, 195 n.12, 97 S. Ct. 2569, 2575 n.12, 53

L. Ed. 2d 683, 692, n.12 (1977). *Cf. The General Council on Finance and Administration, United Methodist Church* v. *California Superior Court,* 439 U.S. 1369, 1371-72, 99 S. Ct. 35, 37, 58 L. Ed. 2d 77, 80 (1978).

If, on remand, the state court were to find against Plaintiffs, the federal issue would be moot, but an erroneous decision on a constitutional issue involving serious public consequences would remain. *Miami Herald Publishing Company* v. *Tornillo,* 418 U.S. 241, 246 n.6, 94 S. Ct. 2831, 2834 n.6, 41 L. Ed. 2d 730, 735 n.6 (1974); *North Dakota State Board of Pharmacy, supra,* at 159, 94 S. Ct. at 410, 38 L. Ed. 2d at 383. Refusal to review immediately the decision of the Michigan Supreme Court on the constitutional issue herein raised threatens serious erosion of federal policy — here the due process guarantee of notice prior to an affirmative imposition of liability.

It is imperative that the judgment in the instant case be treated as final. There is no suggestion that further federal questions will be decided on remand, the federal issue finally decided by the Michigan Supreme Court is separable from, and collateral to, the issues in the later proceedings, and reversal of the final decision of the Michigan Supreme Court on the federal issue would preclude further proceedings in the instant case. *See Shaffer* v. *Heitner, supra,* at 195 n.12, 97 S. Ct. at 2575 n.12, 53 L. Ed. 2d at 692 n.12; *North Dakota State Board of Pharmacy, supra,* at 162, 94 S. Ct. at 412, 38 L. Ed. 2d at 385. *See also National Socialist Party of America* v. *Village of Skokie,* 432 U.S. 43, 44, 97 S. Ct. 2205, 2206, 53 L. Ed. 2d 96, 98 (1977).

THE QUESTION IS SUBSTANTIAL

The issue in this appeal is whether a State's rule of procedure violates the due process quarantees of the Fourteenth Amendment to the United States Constitution by allowing

service of process by publication in a local newspaper to support a personal judgment against an individual, even though that individual's whereabouts are unknown and such a method of notification has no reasonable probability of providing actual notice to the individual.

The resolution of this issue will affect the practice of each of the United States. The importance of the subject matter involved does not derive from the peculiarities of a local practice, but rather transcends the immediate question concerning the rule here involved because of its impact upon the validity of personal judgments rendered by any court in the country. A pronouncement concerning the constitutional adequacy of the type of notice under discussion will have universal application. This is especially true given the trend toward the states' practice of defining the parameters of permissible service to the limits allowed by the United States Constitution. *E.g., Hutchins* v. *Del Rosso,* 116 N.H. 421, 365 A.2d 127, 129 (1976); *Avdel Corporation* v. *Mecure,* 58 N.J. 264, 277 A.2d 207, 209 (1971); *First Wyoming Bank* v. *Trans Mountain Sales & Leasing, Inc.,* 602 P.2d 1219, 1221 (Wyo. 1979).

Furthermore, the importance of the issue is not limited to the type of case here involved. Although its primary impact may be upon the significant number of automobile personal injury claims filed in the state courts, this Court's decision will necessarily affect any action seeking to impose affirmative personal liability upon an absent defendant. As has been noted, the advent of far-reaching long-arm statutes will result in courts increasingly being faced with problems concerning the sufficiency of notice to absent defendants. Note, *Civil Procedure — Constitutionality of Constructive Service of Process on Missing Defendants* [hereinafter *Constitutionality of Constructive Service*], 48 N.C.L. Rev. 616 (1970).

At present, the several States entertain widely divergent views concerning the constitutionality of the kind of service

at issue here. The highest court of at least one state which has had the opportunity to address the question under facts nearly identical to those of the instant case reached a conclusion directly in conflict with that of the Michigan Supreme Court.

In *Barnes* v. *Continental Insurance Company*, 231 Ga. 246, 201 S.E.2d 150 (1973), the Supreme Court of Georgia affirmed the dismissal of a complaint against an insurer on the ground that it was predicated upon an invalid default judgment against its insured. It held that the Georgia statutory scheme comported with due process standards in that it contained "no provision for service by publication in any action for personal judgment for a tort against any person, resident or nonresident." 201 S.E.2d at 151.[2]

Many more state courts have reached the same conclusion, albeit in factually dissimilar situations. The great majority of states which have addressed the issue of notice by publication in actions to impose affirmative personal liability have concluded that such notice cannot support a personal judgment. Because of the diversity of state statutes, court rules and decisions, the postures of the many states are not readily classified. However, certain broad categories stand out in Appellant's survey of state law included in the Appendix hereto (57a-61a).

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[2]In a later decision, the Georgia Supreme Court limited the *Barnes* reasoning by permitting service of process by publication on a resident defendant who had actual knowledge of a suit pending against him and who wilfully secreted himself to avoid service of process. *Melton* v. *Johnson*, 242 Ga. 400, 249 S.E.2d 82, 84-85 (1978). The Georgia court restricted its holding in *Melton* to the facts of that case (where actual notice was not disputed) and refused, on constitutional grounds, to extend it to all cases where a defendant conceals himself to avoid service of process. *Id.*, 249 S.E.2d at 85.

Most states addressing the issue hold that a state cannot impose personal liability on a defendant, resident or nonresident, where notice is given by means of publication, in the absence of a showing of actual notice. Of those states, twenty[3] totally preclude publication notice in actions for personal judgments. Another fourteen[4] prohibit the use of publication as a means of notice except upon a showing of concealment and avoidance of service by the defendant.[5] To the extent that the necessary finding of concealment or avoidance is a real, rather than pro forma, requirement, the exception merely provides for publication notice where the defendant already has actual notice. Unquestionably, the due process guarantee requires no more.

A minority of states permit notice by publication in actions to impose affirmative personal liability under circumstances in which it is plain that there is no reasonable probability that such notice will inform the defendant of proceedings which will adversely affect his legally protected interests. The highest court of two[6] states have explicitly approved such notice and in one other state, a lower court allowed such service.[7] Generally, these states permit notice by publication only after the plaintiff has made a showing of due diligence in attempting to ascertain the identity or whereabouts of the defendant. Such a pro forma requirement, of course, is conceptually unrelated to the question of the adequacy of notice to the

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[3]Arizona, Colorado, Connecticut, Delaware, District of Columbia, Florida, Idaho, Illinois, Louisiana, Maryland, Missouri, Montana, New Hampshire, New Jersey, New York, North Dakota, Rhode Island, Tennessee, West Virgina, Wisconsin.

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[4]Alabama, California, Georgia, Indiana, Iowa, Kansas, Minnesota, Nebraska, New Mexico, Ohio, Oregon, South Carolina, South Dakota, Washington.

(continued on next page)

defendant, but rather expresses a policy decision to allow judgments to be taken against absent individuals even where there exists no likelihood of actual notice.

Notwithstanding the varied and inconsistent perspectives entertained by the several states, the issue herein presented has not been decided by this Court. This Court's decisions have left the sufficiency of the type of service under discussion an open question, 4 Wright & Miller, Federal Practice and Procedure, Civil (1969) §1115 at 472; Note *Constitutionality of Constructive Service,* 48 N.C.L. Rev. 616 (1970); Note, *Service by Publication on a Defendant Who Cannot Be Located in California* [hereinafter *Service by Publication*], 3 U.S.F.L. Rev. 320 (1969), as reference to the decisions of this Court relating to the questions will demonstrate.

In *McDonald* v. *Mabee,* 243 U.S. 90, 37 S. Ct. 343, 61 L. Ed. 608 (1917), Justice Holmes, writing for a unanimous Court, held that publication in a local newspaper was insufficient notice to sustain a personal judgment against a domiciliary of the forum state who had left the state, not intending to return. Although the holding itself appears to dispose of the issue in the instant case favorably to Appellant, four aspects of the *McDonald* decision qualify its impact.

First, it did not involve a defendant whose whereabouts could not be ascertained. Second, it is difficult to determine

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[5]In its unpublished per curiam opinion in this case, the Michigan Court of Appeals stated that "[t]he evidence indicates that defendants have purposefully concealed their whereabouts." (21a). This unwarranted finding of fact finds no support from the record.

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[6]Hawaii, Michigan.

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[7]North Carolina.

with any precision the extent to which the analysis in that case was premised upon the territorial restrictions imposed by *Pennoyer* v. *Neff*, 95 U.S. 714, 24 L. Ed. 565 (1877), which have since been undermined by subsequent decisions. Note, *Must Service of Process Be Personal In Order to Obtain In Personam Jurisdiction?* 35 Mo. L. Rev. 260 (1970); Note, *Service by Publication*, 3 U.S.F.L. Rev. 320 (1969). Third, it is similarly uncertain whether the same result would have been reached if service by publication — although futile — had been "the substitute . . . most likely to reach the defendant . . . ." 243 U.S. at 92. Finally, subsequent decisions of this Court have engendered doubt as to the extent and continued vitality of the precise holding in the *McDonald* case.

In *Wuchter* v. *Pizzutti*, 276 U.S. 13, 48 S. Ct. 259, 71 L. Ed. 446 (1928), this Court held that a statute making an officer of the state a proper person to receive process for an allegedly negligent non-resident motorist must also provide for a method of serving the defendant in a manner "reasonably probable" to give him actual notice of the lawsuit. However, as is apparent from the holding itself, the *Wuchter* decision is not directly on point with the instant case.

This Court's next major decision relating to the question here involved was *Milliken* v. *Meyer*, 311 U.S. 457, 61 S. Ct. 339, 85 L. Ed. 278 (1940). In that case, this Court held that the existence of a person's domicile in a state was sufficient to warrant that state's exercise of personal jurisdiction over him even though the service of process upon him took place in another state. In *dicta* (the adequacy of the notice received was not at issue), Justice Douglas indicated that the adequacy of the notice would depend upon whether it was "reasonably calculated" to give actual notice of the proceedings. However, the impact of that decision upon the holding in *McDonald* v. *Mabee, supra*, is unclear because the latter case was cited with reference to the adequacy of substituted service.

The decision most frequently cited as authoritatively establishing the constitutional parameters governing the adequacy of notice is *Mullane* v. *Central Hanover Bank & Trust Company*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950). In *Mullane*, this Court held that service by publication was constitutionally sufficient as to beneficiaries of a trust fund whose interests or whereabouts could not be ascertained through the exercise of reasonable diligence. In so holding, this Court stated that "in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." 339 U.S. at 317. However, reasoned analysis of two aspects of the *Mullane* decision compels the conclusion that it did not decide the issue presented here.

First, neither the language of the above-quoted passage nor the underlying considerations pertinent to the type of case there involved are applicable here. The *Mullane* case concerned the very ability of the state to provide a method for settling trust accounts. (The importance of that aspect of *Mullane* will be further discussed below). Furthermore, unlike the instant case, the purpose of that action was not the affirmative imposition of liability upon an individual, but the "foreclosure [of] rights" to challenge the trustee's decision. Given that the degree of notice "appropriate to the nature of the case", 339 U.S. at 313, will vary depending upon the nature of the interests involved and the extent and seriousness of the consequences to the party entitled to notice, *Mullane* is eminently distinguishable from the instant case on both grounds.

Second, the approval of a "probably futile" method of notification in *Mullane*, conflicts with the requirement imposed in *Wuchter* v *Pizzutti, supra*, that the notification necessary to a tort defendant be "reasonably probable" to give him actual

notice of the action. In this regard it should be noted that the latter case was cited with apparent approval by the *Mullane* Court. 399 U.S. at 315.

The only decisions since *Mullane* which have addressed the adequacy of notice are inapposite. In both *Walker* v. *City of Hutchinson*, 353 U.S. 112, 77 S. Ct. 200,1 L. Ed. 2d 178 (1956) and *Schroeder* v. *City of New York*, 371 U.S. 208, 83 S. Ct. 279, 9 L. Ed. 2d 255 (1962), this Court held publication insufficient to warrant action affecting the respective appellants' realty where there existed an easily effected and superior method of notification. Both the nature of the respective cases and the circumstances there present (readily ascertainable whereabouts of the property owners) distinguish them from the case-at-bar.

Finally, the focus of this Court's attention in recent years has not been upon the questions of notice but rather upon the conceptually distinct issue of the degree of "contact" required to justify a state's assertion of personal jurisdiction over a defendant in the first instance. *E.g.*, *Rush* v. *Savchuck*, 444 U.S. 320, 100 S. Ct. 571, 62 L. Ed. 2d 516 (1980); *World-Wide Volkswagen Corporation* v. *Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980); *Kulko* v. *Superior Court of California*, 436 U.S. 84, 98 S. Ct. 1690, 56 L. Ed. 2d 132 (1978); *Shaffer* v. *Heitner*, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977).

Not since the *McDonald* decision in 1917 has this Court rendered any holding concerning the quality of notice necessary to maintain the affirmative imposition of personal liability upon an individual defendant. Subsequent decisions of this Court have not clarified the question whether service by publication alone is sufficient to impose such liability upon a missing person, and the decision most frequently cited in such situations is itself more than 30 years old. *Mullane*, *supra*.

The only relatively recent disposition of this Court in any way related to the question here involved was in *Nelson* v. *Manley, cert. denied sub nom. Soszka* v. *Manganaro*, 394 U.S. 573, 89 S. Ct. 1299, 22 L. Ed. 2d 555 (1969) (denying certiorari). That case, however, provides no basis for declining to entertain the appeal in the instant case.

First, the question presented in *Nelson* was narrowly restricted to a concededly "singular and unprecedented" provision in a particular state's non-resident motorist statute. *Nelson* v. *Manley, supra,* Jurisdictional Statement at 10. No persuasive reason is apparent for this Court's hearing an appeal and rendering a decision whose applicability would be so limited. In contrast, the issue presented in the case-at-bar carries direct implications for every notice provision in every state pertaining to actions seeking to impose personal liability upon an individual. See the survey of pertinent state law set out in the Appendix hereto (57a-61a).

Second, the appellant/petitioner in *Nelson* failed to bring to this Court's attention the fundamental and inherent distinction (discussed below) between judgments imposing personal liability, *see, e.g., Wuchter* v. *Pizzutti, supra; McDonald* v. *Mabee, supra,* and those involving merely a foreclosure of rights with regard to certain property or status, *see, e.g., Mullane* v. *Central Hanover Bank & Trust Company, supra.* That distinction, although necessary to a well-reasoned determination of the issue, is not so apparent on the face of this Court's prior opinions as to warrant the presumption that this Court considered it in response to the limited legal exposition in the *Nelson* Jurisdictional Statement.

Finally, whatever the precedential value to be accorded the disposition in *Nelson,* it is undeniable that there has been no general recognition that it answered the question here involved. Reference to the commentary discussing the issue and related matters since 1969 suggests that the question posed

requires a more definitive answer. *See* Note, *Service of Process by Mail*, 74 Mich. L. Rev. 381 (1975); Note, *Must Service of Process Be Personal in Order to Obtain In Personam Jurisdiction?* 35 Mo. L. Rev. 260 (1970); Note, *Constitutionality of Constructive Service*, 48 N.C.L. Rev. 616 (1970); Note, *Constitutional Law: The Validity of Service of Process by Mail When There Is No Return Receipt: The Outer Limits of Due Process*, 25 Okla. L. Rev. 566 (1972); Note, *Service by Publication*, 3 U.S.F.L. Rev. 320 (1969).

Despite the absence of a definitive pronouncement from this Court on the question, Appellant submits that the principles established by this Court's prior decisions and the nature of the liability involved compel the conclusion that the type of notice authorized by the Court Rule in this case cannot pass constitutional muster. The Michigan Supreme Court clearly erred in holding that G.C.R. 1963, 105.8 authorizes service of process by publication above as a permissible means of affording a defendant notice of an action seeking to impose affirmative personal liability upon him.

It is, of course, not necessary that the method of notification result in actual notice to the parties. *E.g.*, *Mullane* v. *Central Hanover Bank & Trust Company*, *supra*; *McDonald* v. *Mabee*, *supra*. Rather, the proper focus of inquiry is the degree of likelihood that the prescribed method will impart such notice. Appellant contends that the degree of likelihood of actual notice required for actions seeking to impose affirmative liability upon a defendant is greater than for other types of actions.

Appellant does not premise its position on the *in personam/in rem* distinction *per se*, which was rejected by this Court in the *Mullane* decision. Indeed, Appellant concurs that such a distinction is not useful for two related reasons: the vagaries of state law preclude a nationally uniform characterization of actions on that basis; and any rule premised upon such a

distinction would turn on considerations not relevant to the factors properly dispositive of the quality of notice appropriate to a given case.

It is for those very reasons that the distinction here advanced stands as a principled and workable basis for decision. As already noted, this Court has stated that the kind of notice required must be "appropriate to the nature of the case". *Mullane,* 339 U.S. at 313. As shall be hereinafter demonstrated, Appellant's characterization of the nature of the instant case and those like it is grounded upon the nature of our social-political-economic system as well as upon the decisions of this Court.

It is inherent in our system of government that there are certain types of cases in which it is absolutely imperative that a decision concerning the subject matter of the action be possible under *all* circumstances, including the absence of some of the interested parties. For example, a system premised upon private ownership of property would eventually cease to function viably without some means of determining rights in property under any and all circumstances. Similarly, social necessity mandates that certain determinations concerning status (e.g. divorce) be possible in all situations. In such cases, the possibility of some decision is a matter of systemic necessity. The reasoning underlying this Court's decision in the *Mullane* case recognized that fact:

> "Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding. ***But the vital interest of the State in bringing any issues as to its fiduciaries to final settlement can be served only if interests or claims of individuals who are outside of the State can somehow be determined.*** A construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified.

> "Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment."

Mullane, 339 U.S. at 113-14 (emphasis added).[8] Furthermore, concluding that the absence of any notice to certain of the interested trust beneficiaries was a "justifiable" and "reasonable risk", this Court relied upon the presence of parties actually notified whose interests were identical to those of the unnotified persons. *Id.*, 339 U.S. at 319. The distinction between the type of case involved in *Mullane, supra*, and personal injury cases has been noted. Note, *Constitutionality of Constructive Service*, 48 N.C.L. Rev. 616, 622 n.30.

On the other hand, actions seeking to impose affirmative liability upon a defendant are governed by quite different considerations. First, the systemic necessity for a decision under all circumstances is absent. Although both an injured party and the state have an interest in providing a means whereby the former can recover money damages for his injuries, that interest is by no means "vital" in the same sense as the ability to determine interests in property or other matters affecting the very viability of the governmental system.

Furthermore, the affirmative nature of the liability imposed in a personal injury action is more momentous in kind and scope than the "foreclosure of rights" regarding particular property or status. Such affirmative liability exposes all of a person's assets (save those specifically protected) to further judicial action to enforce the default judgment.

The only two decisions of this Court directly involving the sufficiency of notice in an action seeking to impose such liabil-

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[8] The two subsequent notice decisions reaffirming and applying the *Mullane* analysis both involved the disposition of real property. *Schroeder* v. *City of New York, supra; Walker* v. *City of Hutchinson, supra.*

ity rejected futile methods of notification as insufficient to sustain a judgment against an individual.

In *McDonald* v. *Mabee, supra,* this Court expressly rejected service by publication alone as insufficient notification to one who has left the forum state, noting that approving even service at the "last and usual place of abode" in such circumstances would be "going to the extreme." *Id.,* 243 U.S. at 92.

In *Wuchter* v. *Pizzutti, supra,* this Court characterized the requisite notice in broader terms. Citing a variety of state court decisions as well as the *McDonald* case, this Court held that the validity of service will be sustained "if the statutory provisions in themselves indicate that there is *reasonable probability* that if the statutes are complied with, the defendant will receive actual notice . . . ." *Id.,* 276 U.S. at 24 (emphasis added).

In the case-at-bar, there is no dispute but that the method of service employed was an almost certainly futile means of notifying the principal Defendants of the pendency of the lawsuit. Both this Court, *e.g., Mullane* v. *Central Hanover Bank & Trust Company, supra,* and the Michigan Supreme Court, *Dow* v. *State of Michigan,* 396 Mich. 192, 240 N.W.2d 450 (1976), have recognized that there is no reasonable probability that publication will give actual notice of the pendency of litigation:

> "'[N]otice by publication is a poor and sometimes a hopeless substitute for actual service of notice,' and . . . '[i]ts justification is difficult at best.'"

Schroeder v. *City of New York,* 371 U.S. at 213, quoting *New York* v. *New York, N.H. & H.R.R.,* 344 U.S. 293, 296, 73 S. Ct. 299, 97 L. Ed. 333 (1953).

Nevertheless, the Michigan Supreme Court held such service constitutionally adequate on the basis of this Court's deci-

sion in *Mullane, supra.* Briefly stated, the decision in the instant case was clearly erroneous for three reasons.

First, the Michigan Supreme Court failed to consider the fundamental distinctions between the "nature of the case" involved in *Mullane, supra,* and an action seeking to impose affirmative liability upon an absent defendant. As already demonstrated, the systemic necessity for some decision, the inherently limited nature of a "foreclosure of rights", and the presence of other litigants to protect the interests of the absent parties were the salient features of the *Mullane* decision. Without pertinent discussion, the Michigan Supreme Court applied the *Mullane* formula to impose affirmative and unlimited liability upon an individual in a case not involving matters which must always be capable of determination.

Second, the Michigan Supreme Court did not even allude to the decisions of this Court which directly addressed the quality of notice required to impose the kind of liability here involved, *Wuchter* v. *Pizzutti, supra,* and *McDonald* v. *Mabee, supra.* As was discussed above, those cases impose a more stringent notice requirement where the action concerns the imposition of liability as opposed to the mere "foreclosure of rights." Specifically, the *Wuchter* case stated that in actions such as the case-at-bar, the method of notification must be "reasonably probable" to impart actual notice. No one could seriously contend that publication in a local legal newspaper even approaches such a standard.

Third, the decision cannot be justified on policy grounds by balancing the respective interests of the plaintiffs, the defendant, and the state. *See* Note, *Constitutionality of Constructive Service,* 48 N.C.L. Rev. 616 (1970).

The plaintiff's interest is always the same: to have a source of recovery. The primary obstacle to insuring such recovery against a missing defendant is, of course, the statute of limita-

tions. The obvious and straightforward manner of avoiding that bar is to provide for the tolling of the statute of limitations during the period that plaintiff cannot, through the exercise of reasonable diligence, identify or locate the defendant. Although involving some inconvenience and uncertainty (given the impairment of evidence through the passage of time), such a compromise is eminently preferable to denying a defendant any trial at all prior to the imposition of considerable personal liability.

The defendant's interest, of course, is to be afforded an opportunity to defend the action prior to the imposition of such liability. Regardless of any mitigating measures suggested to reduce the impact of such a judgment, there is no adequate substitute for the defendant's actual presence to defend himself.

This Court should also note that the justifications customarily advanced in favor of resolving the dilemma in favor of the plaintiff necessarily *assume* the absent defendant's liability. *See, e.g.*, Note, *Constitutionality of Constructive Service*, 48 N.C.L. Rev. 616 (1970); Note, *Service by Publication*, 3 U.S.F.L. Rev. 320 (1969). Although such a presumption may be appropriate for underscoring the difficulty facing a plaintiff unable to locate a potential defendant, it hardly provides a principled basis for decision of the question under discussion. The fact remains that "due process" is a hollow phrase to a person upon whom large individual liability has been imposed in the absence of an opportunity to defend himself.

The state's interests do not preponderate in favor of either a plaintiff or an absent defendant. It has a self-evident interest in maintaining the integrity of its legal process by insuring that final judgments are rendered only after the fairness of the proceedings is assured. On the other hand, providing injured citizens a source of judicial recovery for tortiously inflicted injuries is also a legitimate concern. However,

nothing inherent in either of those considerations renders one predominant.

Furthermore, in personal injury cases, the *necessity* for the state to provide a method of determination is absent. *See Mullane, supra.* Thus, the conceptual vehicle for justifying dispensing with a meaningful notice requirement, which is legitimately invoked in property and status cases, is not available here.

In short, neither the plaintiff's interest nor those of the state provide a sufficient principled basis upon which to eliminate the absent defendant's rudimentary right to reasonable notice of an action against him. It is noteworthy in this regard that the Michigan Supreme Court did not even attempt an analytical explanation of its decision.

This Court has yet to make an authoritative and definitive pronouncement concerning the quality of notice necessary to sustain a judgment imposing personal liability upon a defendant. In the absence of such a decision, the several states have arrived at a variety of inconsistent conclusions concerning the constitutional adequacy of service by publication in such cases. The result has been a number of decisions (such as the one here involved) upholding judgments in which there was absolutely no reasonable probability of actual notice.

The importance of this issue is demonstrated by reference to its applicability not only to every state but also to every cause of action seeking to impose personal liability upon an individual. Reasoned consideration of the principles underlying the pertinent decisions of this Court concerning the quality of notice required to sustain judgments of different natures compels the conclusion that notice by publication alone will not support a judgment imposing personal liability on an individual.

CONCLUSION

This Court should summarily reverse the decision of the Michigan Supreme Court and remand this case to that Court with instructions to vacate the judgment against the individual Defendants for lack of personal jurisdiction and to vacate the subsequent garnishment judgment against the Detroit Automobile Inter-Insurance Exchange.

Alternatively, this Court should accept the case for plenary review either as an appeal or, pursuant to 28 U.S.C. §2103, as a petition for certiorari granted.

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May, 1981